98-1713

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner,

v.

WALTER DON MAZEPINK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an absent homeowner with a legitimate expectation of privacy in his premises is entitled to claim Fourth Amendment protection where police officers executing a search warrant fail to knock and announce prior to their forcible entry into his residence when the homeowner's family members and invitees are inside?

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STATEMENT OF THE CASE

On December 20, 1996, police officers of the Fort Smith Police Department, Fort Smith, Arkansas, were authorized to execute a search warrant at the residence shared by Respondent, Walter Don Mazepink, and his girlfriend, Janice Gail Schnitzlein. However, the search warrant did not authorize a "no-knock" search.

Shortly before the execution of the search warrant police officers observed the Respondent leave the residence and drive away in a vehicle. Also prior to entry, police officers observed an adult female, later identified as Janice Schnitzlein's daughter, Tricia Bencie, arrive at the residence.

Immediately prior to their forcible entry into the Respondent's residence, the police were aware, or had reasonable cause to believe, the following facts relevant to the Respondent's property and to the personal safety of police officers and persons inside the residence:

1. That the only persons inside the residence were two unarmed females;

2. That there was no reason to believe there were any guns inside the residence;

3. That there was no evidence that Janice Schnitzlein or her daughter, Tricia Bencie, had any violent or assaultive tendencies;

4. That there was no evidence that any of the three individuals, the Respondent, Janice Schnitzlein, or Tricia Bencie, had ever made

any statement that he or she would resist arrest if such were to be attempted by a police officer.

Therefore, immediately prior to their forcible entry into Respondent's residence, the police officers had no reason for concern about their personal safety so as to justify the destruction of Respondent's property or to risk the personal safety of Janice Schnitzlein or Tricia Bencie. Furthermore, the police officers had no reason to believe that the evidence was susceptible to ready destruction. Finally, the police did not have reason to believe that persons inside the residence were aware that police officers were waiting to execute a search warrant.

At approximately 6:56 p.m., four police officers quickly approached the wooden, front door of Respondent's residence while two police officers watched the back of the premises. The lead investigator in the case, Detective Wayne Barnett, knocked on the front door and shouted, 'Police! Search warrant!" Approximately two to three seconds later, another police officer broke open the front door with a battering ram. The four police officers entered the residence with their weapons drawn, shouting, "Police! Search warrant!"

Upon entry these police officers immediately encountered Ms. Bencie standing near the front door in the living room. Detective Barnett ran past Ms. Bencie to a back bedroom of the residence where he found Ms. Schnitzlein. After handcuffing Ms. Schnitzlein, Detective Barnett located approximately four ounces of methamphetamine and various items of drug paraphernalia. Shortly thereafter, the Respondent returned to the residence and was immediately

placed under arrest. During the ensuing search of the Respondent's residence approximately eight more ounces of methamphetamine were found in a portable ice chest in the garage attached to the residence. The Respondent and Ms. Schnitzlein were charged with possession of methamphetamine in excess of 400 grams and possession of drug paraphernalia.

Both the Respondent and Ms. Schnitzlein filed motions to suppress evidence. At the pre-trial hearing both defendants argued that the search of their residence was unreasonable under the Fourth Amendment because the police had forcibly entered without first knocking and announcing their authority and purpose, and under the particular circumstances of their case, the police did not have reasonable suspicion that knocking and announcing would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, by allowing the destruction of evidence. The trial court denied the Respondent's and Schnitzlein's motions to suppress evidence.

On December 8, 1997, with the approval of the trial court and the consent of the prosecuting attorney, the Respondent and Schnitzlein entered conditional pleas of nolo contendere pursuant to Arkansas Criminal Procedure, Rule 24.3(b) to the offenses of Possession with Intent to Deliver a Schedule II Controlled Substance and Possession of Drug Paraphernalia. The Respondent was sentenced to the Arkansas Department of Corrections for 40 years with 20 years to be suspended.

On appeal to the Arkansas Supreme Court, the Respondent and Ms. Schnitzlein again argued that the evidence seized during the search of their residence should be

suppressed because the police had failed to knock and announce their identity and purpose prior to attempting forcible entry. The Respondent and Ms. Schnitzlein contended that police forcibly entered their residence pursuant to a standard police procedure for executing felony search warrants and not because police had reasonable suspicion of countervailing law enforcement interests that would justify dispensing with the knock and announce requirement.

The Petitioner addressed the arguments on the merits, and further argued that the Respondent did not have standing to allege his Fourth Amendment rights were violated by the illegal entry since he was not present at the time the police forcibly entered his residence. The Petitioner also argued that the evidence seized was admissible under the "inevitable discovery" doctrine, and that application of the exclusionary rule was not the appropriate remedy for a knock and announce violation.

The Arkansas Supreme Court applied traditional Fourth Amendment analysis in rejecting the Petitioner's argument that the Respondent lacked standing to challenge the police officers' method of entry into his residence because he was not present at the time of entry. (Pet.App. 3-8) The Court held that the Respondent's "standing" to seek exclusion of the evidence obtained during the search of his residence was grounded in his right to exclude others and to be free from illegal police invasion of his privacy in his residence. The Court followed *Alderman v. United States*, 394 U.S. 165 (1969) in ruling that the Respondent's legitimate expectation of privacy in his residence encompassed his right to expect not only privacy for himself, but for his family and invitees, including his live-in girlfriend, Ms. Schnitzlein, and her daughter, Ms. Bencie. (Pet.App.7) The Court also rejected the Petitioner's other arguments.

Accordingly, the Court reversed the trial court's denial of the Respondent's and Ms. Schnitzlein's motions to suppress the evidence and remanded the case to the trial court to vacate the conditional pleas of nolo contendere. (Pet.App.20) From that ruling the Petitioner brought its Petition for a Writ of Certiorari with regard to the Respondent's entitlement to Fourth Amendment protection.

REASONS FOR DENYING THE WRIT

I. The Arkansas Supreme Court's Decision Is Not In Conflict With Decisions of Other Federal and State Courts.

In this case the Arkansas Supreme Court applied traditional Fourth Amendment analysis in reaching its unanimous decision that the Respondent had "standing" to challenge the legality of the search of his residence, including the method of entry and execution of the search, although he was not present at the time of the illegal entry. (Pet.App.3-6) The Court relied upon principles set forth in *Rakas v. Illinois,* 439 U.S. 128 (1978) in determining that search of the Respondent's residence infringed an interest of the Respondent the Fourth Amendment was designed to protect. (Pet.App.4) The Court relied upon *Alderman v. United States,* 394 U.S. 165,179 n.11 (1969) in ruling that Respondent's legitimate expectation of privacy in his residence encompassed his right to expect privacy, not only for himself, but also for his family and invitees, including Ms. Schnitzlein and Ms. Bencie. Implicit in the Court's ruling pursuant to *Alderman* is the Respondent's Fourth Amendment interest in the personal safety of Ms. Schnitzlein and Ms. Bencie who were at risk due to their presence inside the residence at the time of the police officers' forcible entry. (Pet.App.7-8)

Since the Petitioner cannot reasonably claim any conflict of authority in the established principles set forth in *Rakas* and *Alderman* which were relied upon by the Arkansas Supreme Court in reaching its decision, the Petitioner complains that the Court misapplied the law articulated by this Court concerning who may challenge a search. Brief of Petitioner at 6.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10(c).

There is no compelling reason for this Court to grant certiorari to consider the Petitioner's claim that in this case the Arkansas Supreme Court misapplied the properly stated rules of law set forth in *Rakas* and *Alderman*.

Petitioner claims that the Arkansas Supreme Court decision has created a conflict of authority with regard to whether an absent defendant may challenge police officers' method of entry in a premises where the defendant has a legitimate expectation of privacy. Brief of Petitioner at 6. The Petitioner cites a number of older federal and state cases that deal with interpretation of the "knock and notice" provisions of federal statute 18 U.S.C. § 3109 and similar state statutes. Brief of Petitioner at 6-8. Evaluation of the cases cited, however, presents no real conflict of authority as to the question presented in the Petition. A review of these cases shows that there is no compelling reason for this Court to grant certiorari to consider fact-based distinctions between Respondent's case and the cases described below.

For example in *United States v. Valencia-Roldan*, 893 F.2d 1080 (9th Cir. 1990), a case relied upon by the

Petitioner, the Ninth Circuit Court of Appeals did not even consider whether the executing officers failed to comply with the "knock and notice" provisions of 18 U.S.C. § 3109 before entering the defendant's apartment. The Court simply stated in a conclusionary manner that defendant lacked standing to assert this argument because he was not present at the time. *Id.* at p. 1081, n.1. Without a proper legal analysis such as that set forth below in *United States v. Zermeno,* 66 F.3d 1058 (9th Cir. 1995) it is impossible to determine whether the unannounced entry infringed upon an interest of the absent defendant that the Fourth Amendment was designed to protect. Without such a determination *Valencia-Roldan* cannot properly be relied upon as authority in support of the Petitioner's position.

In *United States v. Zermeno,* 66 F.3d 1058, 1062 (9th Cir. 1995) the same court sets forth the three interests that are said to be served by the rule of announcement:

> (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle."

The court went on to hold that "neither Zermeno nor Silva Sosa had any expectation of privacy in the house the agents forcefully entered." Thus, neither defendant was entitled to standing under 18 U.S.C. § 3109 based upon a privacy interest.

The Respondent, on the other hand, is entitled to claim Fourth Amendment protection based upon his legitimate

expectation of privacy in his residence, a fact which has never been disputed by the Petitioner. *See* Brief of Petitioner at 6,10. In its opinion the Arkansas Supreme Court cited *Alderman v. United States,* 394 U.S. 165, 179 n.11 (1969) in ruling that the Respondent's "legitimate expectation of privacy in his residence encompasses the right to expect not only privacy for himself, but also for his family and invitees, including his live-in girlfriend, Appellant Schnitzlein and her daughter." (Pet.App.7) It should be noted that the Respondent's property and privacy interests are personal to him and not vicariously asserted through Ms. Schnitzlein or her daughter. *See Rakas v. Illinois,* 439 U.S. 128,133 (1978). Therefore, unlike the defendants in *Zermeno,* the Respondent is entitled to Fourth Amendment protection, not only as to himself, but also as to his family and invitees, including Ms. Schnitzlein and Ms. Bencie.

In *Zermeno* neither defendant was entitled to standing based upon a property interest because neither defendant showed that he had a property interest in the house the agents forcefully entered. The Respondent, on the other hand, is entitled to Fourth Amendment protection based upon his property interest in his residence. The Respondent's property interest was infringed when the police broke open his front door with a battering ram.

The Petitioner sets forth that the defendant in *Zermeno* could not challenge officers' failure to knock and announce because he was not present at the time of the officers' entry. On its face this appears to support the Petitioner's argument. Upon closer review, however, it clearly does not. The *Zermeno* court ruled that neither defendant came within 18 U.S.C. § 3109's safety rationale because they were not present at the time of the search. *Zermeno* at 1062. Unlike the defendants in *Zermeno,* however, the Respondent had a

safety interest. The Respondent's safety interest was not in himself, but in his family and invitees, who were inside the residence at the time of the forcible police entry. There was an obvious risk to the personal safety of both Ms. Schnitzlein and Ms. Bencie when the police broke open the Respondent's front door and rushed inside his residence with their weapons drawn. Under the principles set forth in *Alderman* the Respondent is entitled to claim Fourth Amendment protection as to the personal safety and security of both Ms. Schnitzlein and Ms. Bencie.

Therefore, unlike the defendants in *Zermeno* the Respondent is entitled to claim Fourth Amendment protection based upon a privacy, property, and a safety interest.

The Petitioner cites *United States v. DeLutis*, 722 F.2d 902 (1983), which is distinguishable from Respondent's case in a number of respects. First, the *DeLutis* court noted that there was a "serious doubt" that the defendant had standing to raise the knock and announce issue on appeal since he had not joined in the motion to suppress filed by his wife. *Id.* at 908. The Respondent, on the other hand, did raise the knock and announce issue in his motion to suppress the evidence.

Furthermore, the defendant was not residing in the house at the time of the entry by the officers, but was serving time in prison for an unrelated offense. *DeLutis*, 722 F.2d at 908. Here, the Respondent was residing in the house and was observed by police officers leaving the residence just moments before the police officers broke open his front door. The court described the defendant as an absentee owner who "hardly comes within the purposes of the statute." *Id.* Arguably, under the facts of the case, the defendant had abandoned the residence, albeit involuntarily, and therefore could not come within the protection of 18 U.S.C. § 3109.

The Petitioner cites two state cases, *State v. Papineau*, 146 Ariz. 272,705 P.2d 949 (Ariz.Ct. App. 1985), and *State v. Johnson*, 716 P.2d 1006 (Alaska Ct.App. 1986) in support of its position that the Respondent, not present at the time of the police entry, does not have standing to challenge a knock and announce violation. Brief of Petitioner at 7-8.

The facts of the two cases cited by the Petitioner, however, are fundamentally different than the circumstances involved in the Respondent's case. In each of these cases the police entered the residence through an unlocked door. Neither *Papineau* nor *Johnson* involve forcible entry, destruction of property, nor any material risk to the safety of persons inside the residence such as occurred at the Respondent's residence.

Consequently, the holdings in *Papineau* and *Johnson* are not persuasive as to the issue in the Respondent's case. Here, the destruction of the Respondent's property could have been avoided if Ms. Schnitzlein and Ms. Bencie, the two women inside the Respondent's residence at the time of the forcible police entry, simply had been given the opportunity to open the door. Further, the manner of police entry in the Respondent's case, breaking open the front door with a battering ram, and rushing inside with weapons drawn, involved an increased risk to the safety of the Ms. Schnitzlein and Ms. Bencie. Indeed, Ms. Bencie was in the living room and near the front door when the police broke the door open with a battering ram and rushed inside. (Pet.App.15, n.2) This risk to the personal safety of Respondent's family members and invitees could have been avoided if the occupants simply had been given the opportunity to open the door to comply with the lawful authority of the police.

Righter v. State, 704 A.2d 262 (Del.1997), *cert. denied*, 118 S.Ct. 1814 (1998), is also distinguishable from the Respondent's case in that the court held that Righter was not the owner of the property and did not have a privacy interest nor a property interest in his grandmother's house.[1] Again, unlike the defendant in *Righter*, the Respondent lived in the residence and had a legitimate expectation of privacy in his home. This included his interest in avoiding the destruction of his property and his interest in the privacy and the safety of his family and invitees.

The Petitioner claims that this Court should consider the issue of whether a person without a legitimate expectation of privacy in the premises, but who is present when officers enter, can challenge officers' failure to knock and announce. Petitioner's Brief at 8-9. As previously stated the Petitioner has never disputed that the Respondent has a legitimate expectation of privacy in his premises. Petitioner's Brief at 6 and 10. There is no compelling reason for this Court to grant certiorari to consider an issue which is not even presented in the facts of Respondent's case.

II. The Arkansas Supreme Court Properly Stated the Rule of Law That a Homeowner Not Present At the Time of Police Officers' Forced Entry into His Residence Can Challenge the Officers' Failure to Knock and Announce.

The gravamen of the Petitioner's argument is that a homeowner cannot challenge police failure to knock and announce prior to forcible entry into his residence unless he

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[1] Righter could only claim a property interest as an occupant of a bedroom in his mother's home.

is physically present at the time of the illegal entry. The Petitioner reaches this erroneous conclusion because it begins with a flawed premise. The Petitioner notes the purposes of the knock-and-announce rule as set forth in *Richards v. Wisconsin,* 520 U.S. 385 (1997). These purposes are to inform occupants of a dwelling that it is about to be invaded, to give them an opportunity to comply with the law, and avoid damage to property by allowing the occupants to open the door so that the police can enter peaceably. *Id.* at 393 n.5. These stated purposes provide the premise by which the Petitioner reaches its erroneous conclusion that, "By definition, the failure to knock and announce cannot infringe these interests of a person who is not present at the time of the entry." Brief of Petitioner at 11.

The error in the Petitioner's analysis is that the above-described purposes of the knock and announce rule, while correctly stated, do not completely set forth the all the interests that are served by the rule of knock and announcement.

> Three interests are said to be served by the rule of announcement: (1) it reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; (2) it guards against the needless destruction of private property; and (3) it symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle." *United States. v. Zermeno* 66 F.3rd 1058 (1995) citing *United States v. Lockett,* 919 F.2d 585 (9th Cir. 1990).

When the interests served by the rule of knock and announcement are fully stated, it is obvious that the

Petitioner's argument fails to consider properly Respondent's interests in: (a) Avoiding the destruction of his property; and, (b) The privacy and safety of his family and invitees inside his residence at the time of the unannounced, forcible police entry.

The common law recognized that individuals should have an opportunity to comply with the law and to avoid the destruction of property occasioned by forcible entry. *Richards v. Wisconsin* 520 U.S. 385, 393 n.5 (1997) citing *Wilson v. Arkansas* 514 U.S. 927,930-32 (1995). Additionally, when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry. *See Richards* at 393n.5.

As the Arkansas Supreme Court correctly noted there were two persons inside the Respondent's residence at the time the officers prepared to enter and the officers were aware of this. Thus, at least one person was present to comply with the officers' request for entry so that they could execute their search warrant. (Pet.App.7) Further, Ms. Schnitzlein's daughter was located near the front door at the time they entered, and "Arguably, she may have been attempting to comply with the law and permit the officers to enter." (Pet.App.15,n.2)

The Petitioner concedes that the Respondent could challenge the search itself. Petitioner's Brief at 10. The Petitioner claims, however, that the Arkansas Supreme Court erred "by concluding that because Mazepink could challenge the search generally, his rights necessarily were infringed by any defect in the method of entering to execute the search warrant." *Id.*

The Petitioner's argument fails to properly consider that it is the method of entry, i.e., forced entry by breaking open doors, that is so destructive to private property interests, so invasive to privacy interests, and so dangerous to the personal safety interests of both the occupants and to the police. Further, it is the method of entering, by breaking open the door of a dwelling, that, historically, was not allowed without announcement of identity and purpose prior to entry. *Wilson* 514 U.S. 927, 931-36.

Here, the Arkansas Supreme Court, applying traditional Fourth Amendment analysis, properly stated the rule of law that because Respondent Mazepink had a reasonable expectation of privacy in the area searched, he was entitled to claim Fourth Amendment protection as to the method of execution of the search. (Pet.App.6)

The Petitioner argues further that the Arkansas Supreme Court failed to properly consider whether the method of entry "infringed any interest of Mazepink's that the Fourth Amendment was designed to protect." Brief of Petitioner at 9-10. Yet, the Respondent's interests were fully and properly considered by the Arkansas Supreme Court under the principles set forth in *Rakas v. Illinois,* 439 U.S. 128 (1978) at (Pet.App.4-6), and *Alderman v. United States,* 394 U.S. 165, 179 n.11 (1969) at (Pet.App.7-8).

The Petitioner attempts to argue that the Arkansas Supreme Court's holding is illogical when the Court states at (Pet.App.7) that its analysis of the issue might have been different if there had been no occupants inside the residence at the time the police forced their entry into the home. Petitioner's Brief at p.11. However, the Court's ruling is not only logical, it is completely consistent with the precedents set

forth in *Wilson* and *Richards*. These cases recognized that "unless police have reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence," (*Richards* at 394), that "individuals should have an opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry."(*Richards* at 393 n.5, citing *Wilson* at 930-932). Therefore, if the police were to encounter a situation wherein they were aware immediately prior to entry that there was no one inside the residence, compliance with the knock and announce requirement would be excused as being "futile." *Richards* at 394. This was not the situation in Respondent's case, however, since immediately prior to their forcible entry the police were aware that Ms. Schnitzlein and Ms. Bencie were present and could have opened the Respondent's door to the police if they been given the opportunity to do so.

III. Other Reasons for Denying the Writ.

A. Adoption of the Petitioner's Requirement That a Person Be"Present" at the Time of the Illegal Entry Would Appear to Require That *Alderman v. United States* Be Overruled

The Arkansas Supreme Court relied upon the principles set forth in *Alderman v. United States* 394 U.S. 165, 179 n.11 (1969) in ruling that "Mazepink's legitimate expectation of privacy in his residence encompasses the right to expect not only privacy for himself, but for his family and invitees, including his live-in girlfriend, Appellant Schnitzlein, and her daughter." (Pet.App.7)

If this Court were to adopt the Petitioner's proposed requirement that a homeowner be physically "present" at the time of the illegal police entry, it would appear to be necessary to overrule the long-standing legal precedent set forth in *Alderman v. United States. Id.*

B. Petitioner's Requirement That the Respondent Must Be "Present" On the Premises Is Logically Inconsistent.

The Petitioner offers no explanation for the logical inconsistency inherent in the Petitioner's argument. The inconsistency is that the Respondent would be entitled to Fourth Amendment protection from police destruction of his property if he were "present" on the premises, but he would be denied Fourth Amendment protection if he were to be absent from the premises, even momentarily, at the time of the illegal entry. Again, the inconsistency is due to the Petitioner's disregard of the principles set forth in *Alderman* and *Richards*. Under the principles established in these cases the Respondent's Fourth Amendment interest in avoiding the destruction of his property is protected by his family and invitees inside the residence being allowed the opportunity to open the Respondent's door to the lawful authority of police..

C. The Petitioner's Requirement That Respondent Be "Present" to Claim Fourth Amendment Protection Ignores the Respondent's Legitimate Interest in the Personal Safety and Security of His Family Members and Invitees.

Finally, the Petitioner's argument that the Respondent must be physically "present" in order to challenge the police officers' failure to knock and announce prior to entry fails to

consider the Respondent's legitimate interest in the personal safety and security of his family and invitees who could be injured in an unannounced, forcible police entry. Under *Alderman v. United States* 394 U.S. 165 (1969) the Respondent has a legitimate interest in the personal safety and security of his family and invitees for which he is entitled to Fourth Amendment protection. In *Alderman* this court ruled that "officialdom invades an area in which the homeowner has the right to expect privacy for himself, his family, and his invitees, and the right to object to the use against him of the fruits of that invasion, not because the rights of others have been violated, but because his own were." *Alderman* at 179 n.11. Under the Petitioner's view, the Respondent would only be entitled to claim Fourth Amendment protection as to his own personal safety, but not as to the personal safety of his family and invitees who were inside the residence at the time of the police forcible entry. The Petitioner's position that Respondent does not have a legitimate interest in the personal safety and security of his family and invitees is not only legally improper under the principles set forth in *Alderman*, but is also in disregard of the practical realities and values inherent in everyday family and extended family living situations.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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